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Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5903

McARTHUR CORBITT,

Appellant,

v.

STATE OF NEW JERSEY,

Appellee.

On Appeal from the Supreme Court of New Jersey

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

Questions Presented[1]

1. Whether the New Jersey statutory scheme for murder needlessly discourages a defendant's Sixth Amendment right to a jury trial and Fifth Amendment right to plead

[1] Appellee omits reference to the Opinions Below, Jurisdiction, Statutes, and Constitutional Provisions Involved since these items have been correctly presented in appellant's brief.

not guilty where its sentencing provisions provide only for a sentence of life imprisonment after a conviction by trial of first degree murder while one who pleads *non vult* to murder may be eligible for a term of life imprisonment or a lesser sentence.

2. Whether the difference in potential minimum sentences between that upon conviction of first degree murder after trial and that upon a plea of *non vult* to murder is consistent with the Equal Protection Clause.

Statement of the Case

On May 11 and 13, 1972, fires occurred at a Newark multi-family dwelling. A visitor at the premises died from smoke inhalation because of the second fire. Appellant McArthur Corbitt, confessed to setting both fires to obtain revenge against his landlord. As a result of these incidents, appellant was indicted for two counts of arson and one count of murder. (A. 2, 3). On April 10, 1973, a jury acquitted appellant of arson in relation to the May 11 fire but found him guilty of arson in connection with the May 13 fire and of murder of the visitor. (A. 5). The murder charge had been tried on a felony murder theory. On May 16, 1973, the mandatory sentence of life imprisonment was imposed on the first degree murder conviction and a concurrent five to seven year prison sentence was imposed for the arson. (A. 5, 8).

A Notice of Appeal to the Superior Court of New Jersey, Appellate Division, was filed on July 31, 1973. (A. 8, 9). On September 23, 1975, the Superior Court, Appellate Division, in an unreported opinion, affirmed the conviction of felony-murder but vacated that for arson on grounds of merger. (A. 9-12). A subsequent Petition for

Certification to the Appellate Division was filed in the New Jersey Supreme Court and was granted on February 18, 1976. The certification was "limited to the question of the validity of the mandatory life sentence upon a jury conviction for murder. . . ." (A. 13).

Appellant argued before the New Jersey Supreme Court that the sentencing scheme of N.J.S.A. 2A:113-3 and N.J.S.A. 2A:113-4 infringed upon his Fifth Amendment right not to plead guilty and his Sixth Amendment right to a jury trial, and deprived him of equal protection under the Fourteenth Amendment. The New Jersey Supreme Court, by a five to two majority, found the sentencing scheme to be constitutional and affirmed the conviction.[2] Specifically, the Court held that the authority of *United States* v. *Jackson*[3] is confined to the case of a choice between trial and plea of guilt when a possible consequence of the former, and only of the former, is the death penalty. The Court further concluded that even if *Jackson* were applicable, "any encouragement or inducement of a defendant to plead *non vult* under our statute and thereby waive his right to trial is not the result of a needless or unnecessary procedural device but a highly useful and desirable one, and the encouragement is therefore not an impermissible infringement on defendant's Fifth Amendment rights."[4] The Court also found that the statutory scheme did not violate the Fourteenth Amendment's Equal Protection Clause.

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[2] *State* v. *McArthur Corbitt*, 74 N. J. 379, 378 A.2d 235 (1977).

[3] 390 U.S. 570 (1968).

[4] 74 N. J. at 400, 378 A.2d at 245.

A Notice of Appeal to this Court was filed in the New Jersey Supreme Court on November 30, 1977. (A. 51). On February 21, 1978, this Court noted probable jurisdiction. (A. 53).

Summary of Argument

Appellant, McArthur Corbitt, was convicted by a jury of first degree murder. Consequently, the trial court imposed the mandatory sentence of life imprisonment.[5] Had he chosen to plead *non vult* to the indictment charging murder generally,[6] and had the court accepted the plea, appellant would have been eligible for a lesser sentence. Although after pleading *non vult* to murder a defendant may be sentenced to life imprisonment, the New Jersey statutes specifically authorize the trial court to impose a lesser sentence not to exceed thirty years.[6a] At issue is whether the possibility of receiving a "lesser term" by entering a plea of *non vult* unnecessarily exacts a penalty with regard to an accused's assertion of his Fifth Amendment right to plead not guilty and his Sixth Amendment right to a jury trial.

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[5] See N.J.S.A. 2A:113-4; *State* v. *Funicello,* 60 N. J. 60, 286 A.2d 55 (1972), *cert. den. sub nom. New Jersey* v. *Presha,* 408 U.S. 942 (1972); *State* v. *Robinson,* 139 N. J. Super. 58, 352 A.2d 587 (App. Div. 1975).

[6] See N.J.S.A. 2A:113-3 and N.J.S.A. 2A:113-4. In New Jersey a "short form" murder indictment charges that offense generally, and therefore the indictment encompasses first degree, second degree and manslaughter. *State* v. *Konigsberg,* 33 N. J. 367, 164 A.2d 740 (1960).

[6a] *Id.*

It is the position of the State of New Jersey that the sentencing scheme of our murder statutes does not needlessly chill assertion of those rights guaranteed by the Fifth and Sixth Amendments, nor does it penalize those who elect to contest their guilt before a jury. The penalty of life imprisonment is not contingent upon an accused's decision to defend against the charges which have been brought. Similarly, a plea of *non vult* does not assure a lesser sentence than that mandated following a conviction of first degree murder by a jury. Since the maximum potential punishment is the same regardless of whether the case is disposed of by jury trial or by plea of *non vult,* the statutes impose no burden on the exercise of an accused's constitutional rights.

Appellant's assertion to the contrary is not supported by the authority of *United States* v. *Jackson*[7] upon which he heavily relies. The bargain or inducement offered the defendant by operation of the Federal Kidnapping Statute in *Jackson* and which this Court found to be unconstitutional concerned avoidance of the death sentence which could be imposed only upon conviction after a jury trial. In the situation presented here, however, the inducement consists merely of the possibility of a sentence less than life imprisonment. That *Jackson* is limited to the clear cut choice between avoiding and risking the death penalty is clear. The threat of capital punishment has a special constitutional significance. Its chilling effect is so great as to be qualitatively different from the threat of a longer sentence.

A broader interpretation of *Jackson* to preclude all inducements to a defendant to plead guilty would seriously implicate the widespread practice of plea negotiating in

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[7] 390 U.S. 570 (1968).

which a defendant pleads guilty in exchange for a promise of conviction on a lesser offense, the dropping of a particular charge against him or the recommendation of a lighter sentence. Yet, this Court in *Jackson* recognized this implication as undesirable and therefore took a narrower view. The decision emphasized that allowing uncoerced guilty pleas was a legitimate congressional objective as part of the task of maintaining flexibility in the criminal process.[8] This Court, on subsequent occasions, has reiterated its strong approval of the practice of plea bargaining—a practice which, in effect, encourages the defendant to waive many of his constitutional rights for the benefit of a lesser sentence. If it is permissible, in plea bargaining, to induce a defendant to plead guilty and waive his right to trial, *a fortiori* no substantial constitutional question is presented when a legislature offers the possibility of a lesser sentence upon rendition of a plea of *non vult*.

Jackson did not hold, as subsequent decisions have made clear, that the Constitution forbids every government-imposed choice in the criminal process that may have the effect of discouraging the exercise of constitutional rights. The question rather is whether the chilling effect is unnecessary and therefore excessive.[9] Thus, even if it is assumed that a burden is imposed by New Jersey's sentencing scheme for murder, it can hardly be said that a defendant is "needlessly" encouraged to plead *non vult*. In short, any encouragement is inconsequential and, in any event, is reasonably related to a proper governmental goal. While it is true that no man should be subject to

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[8] *United States* v. *Jackson, supra,* 390 U.S. at 584-85.

[9] *Id.* at 582.

an enhanced penalty only because he defends against a charge, it does not follow that an accused who frankly acknowledges his guilt should not be given consideration on that account. The concept that one who confesses is a better prospect for rehabilitation has long been accepted by our courts. Further, one who candidly admits his guilt should not, by virtue of that fact, be denied leniency. So called "plea bargaining," which in part is premised upon the idea that a defendant who confesses is entitled to some degree of compassion, has respectable support in New Jersey and throughout the country. It would be specious to contend that the Fifth Amendment bars a potentially less severe punishment upon an admission of guilt.

The sentencing scheme of our murder statutes not only serves the interests of defendants but those of the State as well. The State derives significant benefits from the conservation of limited prosecutorial and judicial resources and the expeditious attainment of penal objectives. Thus, the substantial benefits accruing to the State as well as to the generality of criminal defendants constitute a legitimate "need" for the encouragement of guilty pleas within the permissible limits of the *Jackson* standard. We therefore submit that the New Jersey murder statutes do not infringe upon an accused's Fifth and Sixth Amendment rights and do not "needlessly" and "unnecessarily" penalize those who elect to proceed to trial.

Appellant's equal protection argument is also devoid of merit. The claim of a denial of equal protection is based on the contention that the sentencing scheme of N.J.S.A. 2A:113-3 and 4 has the effect of separating persons who have committed first degree murder into two classes—those who go to trial and those who plead *non*

vult—and of treating the former class differently and discriminatorily as to punishment without a compelling state justification for the difference in treatment. At the outset, we note that the values underlying the equal protection clause are not implicated here since our murder statutes do not create differently treated classes. Rather, they merely offer all murder indictees a choice. The defendant must determine whether to place himself in one "class" or the other. The right to jury trial is not discriminatory but made available to all defendants. Once the election is made, the penal consequences in either case depend upon a combination of variables peculiar to each individual situation. Thus it cannot be said that the State has invidiously classified those who choose to stand trial.

In any event, our murder statutes do not provide disparate punishments for "the same offense." Those indictees who plead *non vult* are guilty of a different crime than those defendants who have been convicted of first degree murder after a jury trial. The crime identified by a conviction of first degree murder is distinct from the undifferentiated crime of murder, as stated in the formal indictment, which will support convictions of first or second degree murder or manslaughter. Therefore, acceptance of a *non vult* plea constitutes conviction of a different crime from first degree murder and may be treated differently.

Even assuming that our statutes establish a "classification" and provide disparate punishments for "the same offense," we submit that New Jersey's sentencing scheme for murder is constitutional under either the "rational relationship" test or the "compelling state interest" formula. Our murder statutes have a legitimate purpose and serve a compelling state interest. The State's interest is not in dealing more harshly with the defendant con-

victed by a jury of first degree murder but rather in ameliorating the rigor of life imprisonment for those offenders who are willing to acknowledge their crime and assume responsibility for their conduct. Thus the potential punishment under our statutes with the concomitant possibility of leniency is reasonably and necessarily related to the governmental goal of promoting rehabilitation. This goal, as well as those purposes associated with economy and expedition in criminal justice administration is advanced by our sentencing scheme for murder.

Since the penalty provisions of N.J.S.A. 2A:113-3 and 4 are reasonably and necessarily related to proper governmental objectives and serve compelling state interests, we respectfully submit that the guarantee of equal protection is in no way infringed by these statutes.

LEGAL ARGUMENT

POINT I

The sentencing provisions of N.J.S.A. 2A:113-3 and N.J.S.A. 2A:113-4 do not place an unconstitutional burden upon a defendant's right to contest his guilt before a jury.

It is well established that the State may not exert an unnecessary price for the assertion of a constitutional right.[10] Thus, for example, this Court has held that state-

[10] See, *e.g.*, *United States* v. *Jackson*, 390 U.S. 570 (1968); *cf. Lefkowitz* v. *Turley*, 414 U.S. 70 (1973); *Gardner* v. *Broderick*, 392 U.S. 273 (1968); *Uniform Sanitation Men* v. *Sanitation Comm'r*, 392 U.S. 280 (1968); *Spevack* v. *Klein*, 385 U.S. 511, 515 (1967); *Garrity* v. *New Jersey*, 385 U.S. 493 (1967); *Griffin* v. *California*, 380 U.S. 609 (1965). See also Note, "Another Look at Unconstitutional Conditions," 117 U. Pa. L. Rev. 144 (1968).

ments obtained during the course of disciplinary investigations under the threat of dismissal from public office cannot be used as evidence in a subsequent criminal prosecution.[11] So too, statutes voiding public contracts entered into by one who has asserted the Fifth Amendment privilege against self-incrimination have been held to be constitutionally infirm.[12] In a similar vein, this Court has condemned the practice of mandatorily disbarring attorneys based upon their exercise of the Fifth Amendment right to remain silent.[13] In these and other contexts, it was held that the law may not place a premium on the assertion of a valued constitutional right.[14]

This much conceded, it is equally clear that our Constitution does not serve to insulate those accused of criminal conduct from the necessity of making delicate choices.[15] The criminal process, like the rest of the legal system, "is replete with situations requiring the making of difficult judgments as to which course to follow."[16] The defendant in a criminal trial "is frequently forced

[11] See *e.g., Garrity* v. *New Jersey, supra.*

[12] *Lefkowitz* v. *Turley, supra.*

[13] *Spevack* v. *Klein, supra.*

[14] See *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *Malloy* v. *Hogan*, 378 U.S. 1 (1964); *United States* v. *Derrick*, 591 F.2d 1 (6 Cir. 1975); *Hess* v. *United States*, 496 F.2d 936 (8 Cir. 1974).

[15] See *e.g., Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973); *McGautha* v. *California*, 402 U.S. 183 (1971); *Brady* v. *United States*, 397 U.S. 742 (1970); *McMann* v. *Richardson*, 397 U.S. 759 (1970). *Cf. Colten* v. *Kentucky*, 407 U.S. 104 (1972).

[16] *McGautha* v. *California, supra* at 213.

to testify himself and to call other witnesses in an effort to reduce the risk of conviction."[17] So too, when an accused presents witnesses at trial, he must reveal their identity and submit them to cross-examination which, in itself, may prove incriminating or may furnish the prosecution with a strong rebuttal evidence.[18] That the defendant faces such a dilemma "has never been thought an invasion" of his constitutional rights.[19] The threshold question is whether compelling the election impairs to an appreciable extent any of the policies underlying the rights involved.[20] Hence, the inquiry must focus upon whether the New Jersey murder statutes' sentencing scheme "unnecessarily" places a burden upon the accused's assertion of his constitutional right to defend against a criminal charge.[21] Resolution of this issue requires examination of the nature and gravity of the choice confronting a defendant charged with murder.

A. No penalty is imposed upon one who chooses to defend against a murder charge since the punishment upon conviction is identical to the maximum sentence which may be imposed on one who pleads non vult.

Appellant argued below that one accused of murder is faced with the "grisly" choice between contesting the State's charges, thus assuring a penalty of life imprison-

[17] *Williams* v. *Florida*, 399 U.S. 78, 83 (1970).

[18] *Id.* at 83-84.

[19] *Id.*, at 84; *State* v. *Corbitt*, 74 N. J. 379, 398, 378 A.2d 235, 245 (1977).

[20] *McGautha* v. *California, supra*, 402 U.S. at 213.

[21] *State* v. *Corbitt, supra*, 74 N. J. at 397, 378 A.2d at 244.

ment if convicted of first degree murder, and pleading *non vult* with the attendant potential of being sentenced to a lesser term of years. It is argued that such a grave choice exacts a penalty with regard to those who wish to exercise valued constitutional rights.

In support of this claim, appellant heavily relies upon *United States* v. *Jackson*.[22] There, this Court declared invalid the death penalty provision of the Federal Kidnapping Act because it "unnecessarily" and "needlessly" burdened the defendant's right to contest the prosecution's charges before a jury. That statute provided that capital punishment could be imposed only upon a jury's recommendation which was binding on the trial court.[23] A defendant could be assured of avoiding the death penalty only by waiving a jury trial or entering a guilty plea. This Court reasoned that since the defendants could avoid the death penalty only by pleading guilty or proceeding to trial before a judge, they were "needlessly encourage[d]" to waive their basic rights both to contest guilt and to do so before a jury.[24] While recognizing the State's legitimate interest in jury-imposed capital punishment, the Court found that there were other means available which would subject all defendants to an equal risk of death and thereby eliminate the "unnecessary" and "excessive" burden upon defendants who desired a jury trial.[25]

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[22] 390 U.S. 570 (1968).

[23] 18 U.S.C.A. §1201(a).

[24] 390 U.S. at 583.

[25] *Id.* at 582.

As a result of the decision in *Jackson*, grave doubts were generated with respect to the validity of statutes which permitted a criminal defendant to avoid capital punishment by foregoing a jury trial. Like the Federal Kidnapping Act, the New Jersey murder statutes provided that only a jury could impose the death penalty.[26] However, our statutory scheme differed because a defendant could not be tried by a judge. Furthermore, acceptance of a plea of *non vult*, by which a defendant could escape the possibility of facing death, was discretionary with the trial court.[27] In *State* v. *Forcella, supra*, the New Jersey Supreme Court held that the Sixth Amendment challenge was meritless because the New Jersey statute required trial by jury in all cases in which the accused contested his guilt.[28] As for the claim that the Fifth Amendment was violated, the majority reasoned that acceptance of a plea of *non vult* was discretionary with the trial judge, and thus the impermissible encouragement to plead guilty that existed under the Federal Act was not present under the New Jersey statutes.[29] The majority further reasoned that the *non vult* plea was enacted pursuant to a valid governmental interest to provide lenity for those who were willing to admit their guilt.[30] The New Jersey Supreme Court, therefore, up-

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[26] *State* v. *Forcella*, 52 N. J. 263, 245 A.2d 181 (1968), rev'd and rem. *sub nom. Funicello* v. *State*, 403 U.S. 948 (1971), appeal after remand 60 N. J. 60, 286 A.2d 55 (1972), *cert. den. sub nom. New Jersey* v. *Presha*, 408 U.S. 942 (1972).

[27] *Id.* at 270-71, 245 A.2d at 184-85.

[28] *Id.* at 272, 245 A.2d at 185.

[29] *Id.* at 279-80, 245 A.2d at 189-90.

[30] *Id.* at 275, 245 A.2d at 187.

held our capital penalty provision in recognition that it constituted nothing more than a form of plea bargaining by allowing consideration to be given to the accused who admits his guilt.[31]

This Court, however, summarily reversed and remanded the matter three years later.[32] On remand, the New Jersey Supreme Court struck the capital penalty provision.[33] It ruled that in all future cases, those found guilty of first degree murder by a jury would be sentenced to a mandatory term of life imprisonment and that the penalty provisions applicable upon a plea of *non vult* would remain intact.[34]

Hence, in 1972 the New Jersey Supreme Court provided the framework under which the murder statutes were to be applied and administered. Accordingly, a defendant who proceeds to trial faces the possibility of receiving a life sentence if found guilty of first degree murder. He may also be found guilty of second degree murder, in which case he faces a maximum exposure of 30 years imprisonment,[35] or manslaughter, in which event he faces a maximum sentence of ten years.[36] He may also be acquitted. A defendant who pleads *non vult* to an indictment which generally charges murder may receive a sentence of life imprisonment. The court may, however, impose a maximum term of 30 years.[37]

[31] *Id.* at 275-76, 245 A.2d at 187.

[32] *Funicello* v. *New Jersey*, 403 U.S. 948 (1971).

[33] *State* v. *Funicello*, 60 N. J. 60, 286 A.2d 55 (1972), *cert. den. sub nom. New Jersey* v. *Presha*, 408 U.S. 942 (1972).

[34] *Id.* at 68, 286 A.2d at 59.

[35] N.J.S.A. 2A:113-4.

[36] N.J.S.A. 2A:113-5.

It is manifest that the sentencing scheme of the New Jersey murder statute is fundamentally different from that struck down in *United States* v. *Jackson, supra.* As noted previously, this Court found it constitutionally offensive to subject only those who contested their guilt before a jury to a greater penalty than all other similarly situated individuals who elected to contest the State's charges. The defect in the Federal Kidnapping statute was the possibility of a greater punishment contingent only upon the exercise of the constitutional right to trial by jury. By contrast, under the New Jersey statutes, the defendant faces exactly the same maximum sentence exposure. Whether he proceeds to trial or enters a plea of *non vult,* he cannot absolutely avoid the potential of receiving a life sentence by admitting the State's charges. This exposure to the identical maximum sentence eliminates the incongruity found offensive in *United States* v. *Jackson, supra,* and exacts no penalty whatever upon an accused who elects to defend against the State's charges.

Both state and federal courts have found no constitutional flaw in statutory sentencing scheme where the maximum potential punishment is the same regardless of whether the case is disposed of by jury trial or plea of guilty.[38] Thus in *Commonwealth* v. *Hargrove,* 434 Pa.

[37] N.J.S.A. 2A:113-3.

[38] *State* v. *Weind,* 50 Ohio St. 2d 224, 364 N.E.2d 224 (Sup.Ct. 1977); *State* v. *Bell,* 48 Ohio St. 2d 270, 358 N.E.2d 556 (Sup.Ct. 1976), *cert granted* 97 S.Ct. 2971 (1977); *State ex rel. Rasnake* v.

(Footnote continued on following page)

393, 254 A.2d 222 (Sup. Ct. 1970), the Supreme Court of Pennsylvania held that a plea of guilty to a murder charge was not unconstitutionally encouraged, notwithstanding the defendant's claim that he had been induced to plead guilty because of his belief that if he were to stand trial there would be a greater likelihood that he would receive the death sentence. This decision was based on the fact that under the Pennsylvania statute, the defendant faced the same possibility of a death sentence whether he pleaded guilty or not guilty since both the judge and the jury had the authority to impose the death sentence. In discussing the *Jackson* case, the Pennsylvania Court stated:

> It is a clear cut choice between avoiding and risking the death penalty which the Supreme Court found to be such an overbearing one in *Jackson.* Here no such decision was placed before the defendant. At worst the defendant had to make a choice between probabilities, neither of which carried any *guarantee* that the death penalty would not ultimately be imposed. . . . [W]e do not believe that the Pennsylvania procedure suffers from the same constitutional infirmities as that struck down in *Jackson.* (434 Pa. at 396, 254 A.2d at 24; emphasis in original)

(Footnote continued from preceding page)

Narick, 227 S.E.2d 203 (Sup.Ct. App. W.Va. 1976); *Commonwealth* v. *Hargrove,* 434 Pa. 393, 254 A.2d 22 (Sup.Ct. 1970); *State* v. *Harper,* 251 S.C. 397, 162 S.E.2d 712 (Sup.Ct. 1968); *Anthamatten* v. *State,* 506 P.2d 959 (Okla. Crim. Ct. App. 1973); *State* v. *Hubbard,* 123 N. J. Super. 345, 303 A.2d 87 (App. Div. 1973); certif. den. 63 N. J. 325, 307 A.2d 98 (1973); *State* v. *Land,* 124 N. J. Super. 303, 306 A.2d 483 (App. Div. 1973); *People* v. *Bradley,* 130 Ill. App.2d 1061, 264 N.E.2d 892 (Ct. App. 1970); *Simms* v. *Eyman,* 405 F.2d 439 (9 Cir. 1969), vacated other grounds, 408 U.S. 845 (1972). *Cf. Ludwig* v. *Massachusetts,* 427 U.S. 618 (1976); *State* v. *Beal,* 470 S.W.2d 509 (Sup.Ct. Mo. 1971).

Similarly, in *Sims* v. *Eyman, supra,* the court held:

> Under Arizona law either the judge or the jury can impose the death penalty so that a defendant must risk death regardless of whether he pleads guilty or chooses a jury trial. The 'burden' petitioner complains of is simply that slightly different evidence may be introduced before a judge, on a guilty plea, than before a jury. This does not constitute the type of burden on the assertion of constitutional rights which *Jackson* would forbid. (405 F.2d a 446)

In *Ludwig* v. *Masschusetts, supra,* the petitioner challenged the constitutionality of Massachusetts' "two-tier" trial system for specified crime, under which the accused is tried in the lower tier, in which no trial by jury is available, and, if convicted, may take a timely appeal to the second tier in which he is entitled to request a trial *de novo* by a jury. In upholding this procedure against due process claims that it unconstitutionally burdened the exercise of the right to a jury trial by subjecting an accused to a potentially harsher sentence if he seeks a trial *de novo* in the second tier, this Court noted that the same range of penaltiies is available at both tiers.[39]

Nevertheless, appellant contends that the mandatory life imprisonment feature of the New Jersey sentencing scheme for first degree murder fails to equalize the relative risks of life imprisonment faced by those accused who elect to stand trial before a jury and those who do not. Appellant's argument, however, overlooks the fact that the possibility of acquittal or conviction of a lesser offense should he proceed to a jury trial, or the imposition of

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[39] 427 U.S. at 628, n. 4.

an identical life imprisonment term should he plead guilty is sufficient to counteract the incentive to plead guilty in order to avoid the mandatory life imprisonment sentence. Although a defendant who elects to stand trial is directly exposed to mandatory life imprisonment, its imposition is dependent upon a contingency-conviction by a jury of first degree murder. If so convicted, life imprisonment is automatic. But, by the same token, a defendant who is acquitted receives no sentence and one who is convicted receives a lesser sentence. So too, the application of the maximum penalty to defendants who plead *non vult* is subject to a contingency—the judicial estimate that life imprisonment is appropriate under the circumstances. Thus the risk of a life sentence that befalls defendants who stand trial and those who do not are relatively equalized. As such, no deterrent effect is exerted on the exercise of constitutional rights.

In any event, the mere fact that an accused pleads *non vult* with the belief that he may receive a mitigated sentence, without more, does not mean that the plea was unconstitutionally encouraged or that he was impermissibly deterred from exercising his Fifth and Sixth Amendment rights.[40] The legislative bargain at issue here maintains the requisite equality of risks and does not condition the receipt of a benefit on a defendant's waiver of his constitutional trial right because there is no assurance, no certainty of avoiding the imposition of life imprisonment upon a plea of *non vult*. In sum, where the identical maximum punishment may follow either a jury trial or a guilty plea, then the statutory scheme is not within the scope of the *Jackson* rationale.

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[40] *State ex rel. Rasnake* v. *Narick*, 227 S.E.2d 203, 206 (Sup. Ct. App. W. Va. 1976); *Commonwealth* v. *Hargrove*, 434 Pa. 393, 254 A.2d 22 (Sup. Ct. 1970).

B. *United States* v. *Jackson* applies only where the death penalty is a consideration in the decision to defend against a charge or to plead guilty.

The question, therefore, is whether the mere possibility of receiving a term of less than life imprisonment by pleading *non vult* "unnecessarily" serves to penalize those who elect to contest their guilt. Stated somewhat differently, at issue is whether our statutory scheme places an unwarranted and needless burden upon an accused who wishes to defend against the State's charges by mandating life imprisonment upon a jury finding of guilt. As we have noted, the strength of the inducement to obtain the benefit and avoid the burden can be ascertained only by carefully focusing upon the magnitude of the choices involved.

In this regard, it is argued that the authority of *United States* v. *Jackson, supra,* extends beyond capital cases to the present situation in which a potentially longer sentence is available to those who assert their innocence than to those who plead *non vult*. We have already distinguished *Jackson* with respect to the fact that the maximum penalty can be invoked both after a plea of *non vult* or after a jury trial. *Jackson* is also clearly distinguishable because capital punishment is qualitatively different from mere imprisonment.[41] The risk of incurring the

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[41] *Cf.* Poe, "Capital Punishment Statutes in the Wake of United States v. Jackson: Some Unresolved Questions," 37 *Geo. Wash. L. Rev.* 719, 739-40, 745 (1969); Note, "Discriminatory Sentencing and the Unitary Trial: Two Areas for Application of the United States v. Jackson Rationale," 31 *U. Pitt. L. Rev.* 118, 121 (1969); Comment, 54 *Cornell L. Q.* 448, 452 (1969); Comment, 44 *N.Y. U.L. Rev.* 612, 616 (1969); "The Supreme Court, 1967 Term," 82 *Harv. L. Rev.* 63, 162 (1968); Comment, 22 *Rutgers L. Rev.* 167, 192-93 (1967).

ultimate sanction surely constitutes a higher price for contesting one's guilt than the risk of a longer sentence. Consequently, the corresponding chilling effect on a defendant's desire to stand trial must necessarily be greater. Its finality and severity render the death penalty *sui generis*.[42] Death is a punishment different from all other sanctions in kind rather than degree.

There is no intimation in *Jackson* that its rationale should be extended beyond a statutory scheme which incorporates capital punishment.[43] On the contrary, this Court in *Jackson* specifically concerned itself with the shockingly unfair position of the accused who must gamble his life in order to exercise basic constitutional rights. It continuously spoke of the magnitude of the choice facing a defendant to whom the assertion of a constitutional right might mean death: ". . . the defendant's assertion of the right to jury trial may cost him his life. . . ."[44] "Under the Federal Kidnapping Act . . . the

[42] "The difference between capital and non-capital offenses is the basis of differentiation in law in diverse ways in which the distinction becomes relevant." *Williams* v. *Georgia*, 349 U.S. 375, 391 (1955) (Frankfurter, J.).

[43] As the New Jersey Supreme Court noted in its decision below:

> There is one clear implication in *Jackson* that once the death penalty was eliminated a viable plea negotiation potential in the recast statute was thought desirable. Responding to government suggestion that the federal act could be sustained by judicial elimination of all guilty pleas and waivers, the Court noted that this would require full-dress jury trials in all cases, and, "apart from the cruel impact of such a requirement upon those defendants who would greatly prefer not to contest their guilt," would "rob the criminal process of much of its flexibility." 390 U.S. at 584. *State* v. *Corbitt*, 74 N. J. 379, 396-97 n. 8, 378 A.2d 235 (1977).

[44] 390 U.S. at 572.

defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die. One problem is to decide whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert their right to contest their guilt before a jury."[45]

Similarly, the dissenting opinion in *State* v. *Forcella*,[46] assumes that *Jackson* applies only in cases involving the death penalty. In rejecting the contention that a statute mandating life imprisonment upon a conviction following a jury trial but permitting a lesser penalty upon a plea of *non vult* would be violative of the Fifth and Sixth Amendments, the dissent noted that "the inducement [to plead *von vult*] would be insignificant when compared to the death penalty stricken in *Jackson*."[47] The soundness of the dissenters' analysis of the parameters of *Jackson* has been fortified by subsequent decisions of this Court. When *Forcella* came to be reviewed by this Court,

[45] *Id.* at 581.

[46] 52 N. J. 263, 245 A.2d 181 (1968).

[47] 52 N. J. at 300, 245 A.2d at 201. The dissenters also observed that "the law has always been administered with pragmatic cognition of the fact that the difference between the death penalty and imprisonment entails more than matters of logic and degree." 52 N. J. at 300, 245 A.2d at 201. *Jackson* was distinguished upon the basis that it was "concerned solely with the grisly choice between a plea or waiver with an assurance of no death penalty, and a jury trial with the danger of capital punishment." *Id.* at 301. This same conclusion was reached by the New Jersey Supreme Court in *State* v. *Corbitt*, *supra*, 74 N. J. at 399, 378 A.2d at 235.

it summarily struck the death sentences of the several petitioners.[48] Significantly, this Court did not suggest that our statute also required revision to eliminate the disparity between potential penalties on a plea of guilty and after a trial. And when the New Jersey Supreme Court thereafter recast the statute in *State* v. *Funicello,*[49] this Court denied review.[50]

The Court has long appreciated the inhibiting effect that the fear of capital punishment will have on the exercise of a defendant's constitutional rights. In *Fay* v. *Noia,*[51] the petitioner was sentenced to life imprisonment in a capital case and his was the "grisly choice,"[52] of whether to appeal and upon retrial possibly face the death sentence or sit content with life imprisonment. The petitioner did not appeal his conviction through the state courts. This Court held that, in view of the fact that petitioner was motivated by a fear of death, his failure to appeal was not a waiver of the right of habeas corpus but merely a refusal to play "Russian Roulette."[53] Likewise, in *Green* v. *United States,*[54] this Court rejected the contention that a defendant convicted of second degree murder waives his constitutional defense of former jeop-

[48] *Funicello* v. *New Jersey, supra,* 403 U.S. 948.

[49] 60 N. J. 60, 286 A.2d 55 (1972).

[50] *New Jersey* v. *Presha, supra,* 408 U.S. 942.

[51] 372 U.S. 391 (1963).

[52] *Id.* at 440.

[53] *Id.*

[54] 355 U.S. 184 (1957).

ardy to a second trial for first degree murder by making a successful appeal. This Court recognized that the price of a successful appeal was the risk of death and "a defendant faced with such a 'choice' takes a 'desperate chance' in securing the reversal of the erroneous conviction. The law should not, and in our judgment does not, place defendant in such an incredible dilemma."[55]

It is therefore evident that the possibility of death is a far different price to pay for contesting one's guilt than the risk of life imprisonment rather than a term of years.[56] Suffice it to say, there is a constitutional distinction between the "encouragement" to waive constitutional rights which the possibility of the death penalty engenders, and the lesser "encouragement" which arises from holding out fewer years' imprisonment for a plea of guilty.[57] The distinction, after all, is between life and death.

Subsequent judicial holdings have made it apparent that *United States* v. *Jackson, supra,* forbids only government induced choices of a substantial nature akin to that involving the clear cut question between life and death, and that

[55] *Id.* at 193. See also *State* v. *Wolf,* 46 N. J. 301, 216 A.2d 586 (1966).

[56] A "life sentence" is, for all practical purposes, a sentence for less than the natural life of the defendant. *State* v. *Corbitt, supra,* 74 N. J. at 397 n. 9, 378 A.2d at 244 n. 9; N.J.S.A. 30:4-123.11.

[57] Responding to the argument that elimination of the death penalty would impair the State's bargaining position in criminal cases, Mr. Justice Marshall, concurring in *Furman* v. *Georgia,* 408 U.S. 238 (1972), observed that "life imprisonment remains a severe sanction which can be used as leverage for bargaining for pleas or confessions in exchange either for charges of lesser offenses or recommendations of leniency." *Id.* at 356.

the risks attendant upon the choice a murder defendant must make under the New Jersey statutes as to whether to defend or plead *non vult* are comparable to those arising from any other kinds of decisions a criminal defendant must make in the course of a prosecution.

In *Crampton* v. *Ohio*,[58] this Court upheld the constitutionality of Ohio's system of conducting criminal trials. In Ohio, the jury is permitted to determine guilt and punishment in a single proceeding. Petitioner argued that unless the trial were bifurcated, he would be coerced to forego his right to remain silent in order to argue for mitigation. This he contended "chilled" his Fifth Amendment right because he risked a harsher sentence if he remained silent. This Court held that the Ohio system did not place an impermissible burden on the petitioner's assertion of his Fifth Amendment right. In short, the Court concluded that, "although a defendant may have a right, even of constitutional dimension, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose."[59] In so holding, it was noted that the decision in *Jackson* was limited to government compelled choices involving life and death.

Similarly, in *Chaffin* v. *Stynchombe*,[60] this Court reiterated the principles set forth in *McGautha* v. *California*, *supra*, and upheld Georgia's unrestricted jury resentencing procedures. Petitioner had been convicted and sentenced to 15 years in prison by a jury on a charge of robbery. He thereafter successfully obtained a writ of

[58] Reported *sub nom. McGautha* v. *California*, 402 U.S. 183 (1971).

[59] 402 U.S. at 213.

[60] 412 U.S. 17 (1973).

habeas corpus. Petitioner was then retried, convicted and sentenced to life imprisonment by a jury which had no knowledge of the previous sentence. Petitioner argued that the possibility of receiving a harsher sentence had a chilling effect on the exercise of his right to appeal or collaterally attack his conviction. The Court was unpersuaded and rejected petitioner's claim that its holding in *United States* v. *Jackson*, *supra*, called for abrogation of the Georgia system. It reasoned that the Georgia practice was a legitimate one and that an incidental consequence of the procedure was that it required the accused to choose to accept the risk of a greater sentence or waive his rights.[61] Despite the fact that under Georgia's system an accused might be penalized by exercising his right to appeal, the Court held that the possibility of receiving a harsher sentence did not needlessly exact an unconstitutional burden.[62]

Courts in other jurisdictions besides New Jersey have also construed the holding in *United States* v. *Jackson*, *supra*, as applying only to the "*grisly*" choice between life and death. In *Whaley* v. *State*,[63] for example, the Kansas Supreme Court rejected a claim that an accused was discouraged from asserting his Fifth and Sixth Amendment rights because of the possibility that the prosecutor would invoke the habitual offender statute if he proceeded to trial. The Court noted that the possibility of an enhanced sentence by electing to contest the State's charges does not alone constitute a burden of the magnitude involved in *Jackson*.[64]

[61] *Id.* at 32-33.

[62] *Id.* at 35.

[63] 202 Kan. 175, 446 P.2d 397 (Sup. Ct. 1968).

[64] *Id.* at 176, 446 P.2d at 398.

Likewise, the Illinois Court of Appeals has held that the financial burden placed upon an accused who elects to contest his guilt by proceeding to trial does not consitute a "substantial" penalty for the assertion of a constitutional right. In *People* v. *Peters*,[65] defendant contended that an Illinois statute which required an accused to reimburse the State's attorney with respect to per diem expenses upon conviction following a trial deprived him of his Fifth Amendment right to contest his guilt. More specifically, it was argued that an assessment of trial costs made pursuant to the statute constituted a penalty imposed by virtue of the defendant's election to defend against the State's charges. The Court of Appeals summarily rejected defendant's claim that *United States* v. *Jackson, supra,* was applicable. The Court held that the financial burden imposed by the statute was infinitely less substantial than the possibility of receiving the death penalty. Hence, the statute did not serve to penalize those who elected to contest their guilt.[66]

In *State* v. *Gumienny*,[67] the Court held that Hawaii's procedure under which acceptance of a plea of guilty may be deferred and a defendant eventually discharged without an adjudication of guilt did not impose an impermissible burden on the exercise of the right to trial by jury. The Court equated the inducement to forego this right inherent in Hawaii's Deferred Acceptance of Guilty Plea (DAGP) procedure with the opportunity to plead guilty

[65] 32 Ill.App.3d 1018, 337 N.E.2d 73 (Ill.App.Ct. 1975).

[66] See also *Fuller* v. *Oregon*, 417 U.S. 40 (1974) (Oregon recoupment statute for attorney's fees does not impermissibly chill assertion of the right to counsel).

[67] 568 P.2d 1194 (Sup.Ct. Haw. 1977).

to a lesser offense pursuant to a plea bargain. It thus reasoned that since the principle of *United States* v. *Jackson, supra,* clearly does not extend to the inducement to forego a jury trial which accompanies a proposal that a defendant plead guilty to a lesser offense, it should have no application to the DAGP procedure.

At issue in *Yeomans* v. *State*,[68] was a Georgia statute allowing those defendants not introducing evidence to open and conclude the argument to the jury, while depriving those defendants who introduced testimony of the same right. The Court concluded that the statute was not constitutional as chilling the assertion of the constitutional right to have compulsory process for obtaining witnesses by penalizing those who choose to exercise such right. In the course of its opinion, the Court noted that the *Jackson* case was no authority for holding the state statute unconstitutional since "there can be no real comparison beween choosing between a trial by jury and a possible death penalty, and choosing between the right to have witnesses on a trial and the procedural advantage of having opening and concluding argument.[69]

It is thus apparent that the mere possibility of receiving a lesser term of imprisonment by not proceeding to trial does not serve to penalize those who choose to defend against the State's charges. Rather, as noted, it was the threat of the death penalty in *Jackson* which rendered the federal statute constitutionally infirm.

[68] 229 Ga. 433, 192 S.E.2d 362 (Sup. Ct. 1972).

[69] *Id.* at 365. *Cf. Stock* v. *State*, 526 P.2d 3, 17 (Alaska Sup. Ct. 1974).

C. The New Jersey statutory scheme does not penalize those who elect to contest their guilt.

New Jersey's statutory scheme does not present a chilling effect on those who choose to plead *non vult* rather than go to trial. To argue otherwise, as appellant suggests, would be to find unconstitutional any statute or practice by which an individual is faced with the choice between receiving a state-bestowed benefit or exercising a constitutional right. We note in this context that if the Fifth and Sixth Amendments bar a lesser penalty when guilt is admitted, the entire practice of plea bargaining is necessarily implicated for certainly the possibility of a plea bargain in any context "encourages" the tendering of guilty pleas in some sense.[70] The broadest interpretation of *Jackson* could conceivably lead to a conclusion that whenever a system provides a means to obtain leniency, either by statute or practice, a defendant who rejects a proposed plea bargain, contests guilt, and receives a heavier penalty, is deprived of his Fifth and Sixth Amendment rights.

The Court in *Jackson,* however, recognized this implication as undesirable and therefore took a narrower view. The decision emphasized that allowing uncoerced guilty pleas was a legitimate congressional objective as part of the task of maintaining flexibility in the criminal

[70] See, "The Supreme Court, 1967 Term," 82 *Harv.L.Rev.* 63, 161-62 (1968). Plea bargaining operates to place a premium upon pleading guilty and the waiver of a jury trial by inducing a defendant to do so in exchange for an advantage concerning the sentence that will be awarded. Empirical studies have amply demonstrated that, as a class, those who plead not guilty before a jury receive higher sentences than those who confess their guilt. See, *e.g.*, Note, "The Influence of the Defendant's Plea on Judicial Determination of Sentence," 66 *Yale L.J.* 204 (1956).

process.[71] This Court approved the practice of plea bargaining—a practice which, in effect, encourages a defendant to waive many of his constitutional rights for the benefit of a lesser sentence.

Decisions subsequent to *Jackson* demonstrate that this Court has not adopted the broad interpretation that appellant now urges.[72] In these cases, defendants, who had pleaded guilty to avoid the possible imposition of the death penalty, attempted to retract their pleas by asserting that the statutes under which they were prosecuted dissuaded them from exercising their constitutional rights. The principal thrust of their argument was grounded upon the claim that they had abandoned their right to defend in order to safeguard their right to live. They thus asserted that their guilty pleas were "coerced." This Court perceived no constitutional violation. More specifically, it was reasoned that the defendants' dilemma was no different from the circumstances existing in any common plea bargaining situation.[73] Although it was recognized that plea bargaining has a potentially chilling effect on assertion of Fifth and Sixth Amendment rights, the practice was upheld as a necessary and legitimate adjunct to the administration of criminal justice.[74]

[71] 390 U.S. at 584-85.

[72] See, *e.g., North Carolina* v. *Alford,* 400 U.S. 25 (1970); *Parker* v. *North Carolina,* 397 U.S. 790 (1970); *Brady* v. *United States,* 397 U.S. 742 (1970).

[73] *Brady* v. *United States, supra,* 397 U.S. at 751.

[74] *Id.* at 751-53. As the Court said in *Brady*:

> [W]e cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary. [397 U.S. at 751-53]

This Court subsequently reiterated its position with regard to plea bargaining. In fact, in *Santobello* v. *New York*,[75] it was suggested that plea bargaining is a virtuous and desirable practice which should be encouraged.[76] This, despite the fact that plea bargaining presents a potentially chilling effect upon the assertion of the constitutional right to defend.

More recently, this Court held that the due process clause of the Fourteenth Amendment is not violated when a state prosecutor carries out a threat made during plea negotiations to have the accused reindicted on more serious charges on which he is plainly subject to prosecution if he does not plead guilty to the lesser offense with which he was originally charged.[77] In the course of its decision, this Court noted:

> While confronting a defendant with the risk of more severe punishment clearly may have a "discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable"—and permissible—"attribute of any legitimate system which tolerates and encourages the negotiation of pleas." *Chaffin* v. *Stynchcombe, supra,* 412 U.S. at 31. It follows that by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty. (98 S.Ct. at 668)

[75] 404 U.S. 257 (1971).

[76] *Id.* at 260-61.

[77] *Bordenkircher* v. *Hayes,* —— U.S. ——, 98 S.Ct. 663 (1978).

The New Jersey *non vult* statute possesses many attributes of plea bargaining. It may potentially be utilized to achieve the same result as the downgrading of offenses or the dismissal of selected charges. In short, our situation is so closely analogous to plea bargaining as to be indistinguishable.[78] If it is permissible, by engaging in plea bargaining, to induce a defendant to plead guilty and waive his right to trial, as this Court has repeatedly so held, *a fortiori* no substantial constitutional question is presented when a legislature offers the possibility of a lesser sentence upon rendition of a plea of *non vult.*

D. No needless nor unnecessary burden is placed upon a defendant who chooses to contest his guilt.

It is the position of the State of New Jersey that *United States* v. *Jackson, supra,* is inapposite for yet another reason. As we have noted, the Supreme Court

[78] As the New Jersey Supreme Court noted below: ". . . encouragement of guilty pleas is at the very heart of an effective plea negotiation program." *State* v. *Corbitt, supra,* 74 N. J. at 396, 378 A.2d at 243-44. Indeed, statutory plea bargaining is arguably the most equitable method of encouraging guilty pleas. See Comment, 44 *N.Y.U.L.Rev.* 612, 619 (1969). In the case of most bargained pleas, the defendant is at the mercy of the prosecutor who has discretion to accept or reject a tendered guilty plea to a lesser crime. *Id.* By reducing prosecutorial discretion, statutory plea bargaining seems to comply with the American Bar Association's recommendation that "[s]imilarly situated defendants should be afforded equal plea agreement opportunities." A.B.A., Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty §3.1(c) (1967). Moreover, statutory plea bargaining eliminates any possibility of vindictive or retaliatory measures taken against an accused for lawfully contesting his guilt. *Cf. Blackledge* v. *Perry,* 417 U.S. 21, 26-28 (1974).

concluded that the death penalty provision in the Federal Kidnapping Act "needlessly encouraged[d]" those charged with having committed the offense to waive their rights both to contest guilt and to do so before a jury.[79] This Court in *Jackson* emphasized that the inducement inherent in the federal statute was "needless" and "unnecessary" and "therefore excessive."[80] The use of these terms by this Court plainly indicates that not every burden imposed upon a defendant who elects to contest the State's charges is subject to constitutional attack.[81] Rather, implicit in *Jackson* is the proposition that if the particular procedure that imposes the penalty serves legitimate functions, then the utility of those functions must be weighed against the procedure's inhibiting effects. It may be that "other values come into play and . . . demonstrate that the incidental impact . . . is not 'needless'. . . ."[82] The issue for present purposes then is whether there is a "needless" encouragement of guilty pleas due to a statutory disparity between either maximum or minimum punishment on conviction and on a guilty plea when the death penalty is not involved. Resolution of this issue requires a determination as to whether the statutory option is reasonably related to a proper governmental goal unattainable by less restrictive alternatives.

At the outset we note that our *non vult* statute, which embodies the principles of plea bargaining, was enacted in pursuance of a valid legislative policy which benefits

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[79] 390 U.S. at 583.

[80] *Id.* at 582.

[81] See *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 30 (1973).

[82] *State* v. *Forcella, supra*, 52 N. J. at 274, 245 A.2d at 186.

and best serves the interests of both the State and defendants who are willing to admit their guilt.[83] It benefits the particular defendant involved by allowing him to avoid the expense and hardship of a trial while assuring the prompt commencement of the correctional process.[84] More significantly, statutory plea bargaining affords the defendant the possibility of reducing his sentencing exposure.[85] In this regard, it should be emphasized that plea bargaining is predicated upon the just and humane concept that those who acknowledge guilt are probably better prospects for rehabilitation and should be given consideration on that account. Surely, "we should not deny a justified leniency for the many, merely to be positive that no man is needlessly encouraged not to defend."[86] The gain to the many plainly outweighs whatever evil may repose in encouraging the guilty to confess. As to the fear that the innocent might be stampeded, "there are safeguards against a false guilty plea."[87] A plea of

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[83] *State* v. *Corbitt, supra*, 74 N. J. at 396, 378 A.2d at 244; *State* v. *Forcella, supra*, 52 N. J. at 275, 245 A.2d at 187. Indeed, N.J. S.A. 2A:113-3 which added the *non vult* plea was intended "to benefit murder defendants" and "to ameliorate the course of capital punishment." *State* v. *Forcella, supra*, 52 N. J. at 277, 278, 245 A.2d at 188, 189. The *Forcella* dissenters point out that the Legislature "ever since 1893 . . . has declared that a murder defendant shall have the right to tender a *non vult* plea which, if accepted, will preclude the possibility of the death penalty." *Id.* at 299, 245 A.2d at 200.

[84] *Brady* v. *United States, supra*, 397 U.S. at 752.

[85] *Id.*

[86] *State* v. *Forcella, supra*, 52 N. J. at 276, 245 A.2d at 188.

[87] *Id.*

guilty may not be entered if the accused claims he is innocent.[88] Further, in New Jersey a "factual basis" must support the defendant's decision not to contest the State's charges.[89] With respect to those who perceive a benefit in the form of a lesser sentence if they plead guilty, it can hardly be argued that they are "needlessly" penalized by virtue of the election to reject such a course. The potential of receiving a lesser penalty upon a plea of guilty is not "unnecessary." Nor is the burden that is incidentally imposed upon such an individual "excessive."

From the State's viewpoint, our statutory sentencing scheme for murder serves the interest in the efficient administration of criminal justice by conserving scarce judicial and prosecutorial resources for those cases in which there is a substantial issue of the defendant's guilt.[90] The flexibility of the criminal process is preserved thereby increasing the court's ability to individualize justice. Finally, encouraging guilty pleas allows for imposition of punishment which may more effectively attain penal objectives.[91]

It is this mutuality of advantage inherent in plea bargaining in general, whether statutory or prosecutorial, that perhaps explains, according to *Brady*, "the fact that at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty, a great many of them no doubt motivated at least in part by the

[88] *State* v. *Reali*, 26 N. J. 222, 139 A.2d 300 (1958).

[89] *Id.*

[90] *Cf. Brady* v. *United States*, *supra*, 397 U.S. at 752.

[91] *Id.*

hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial to judge or jury."[92] Thus, the substantial benefits to the State as well as to the generality of criminal defendants, noted above, constitute a "need" for the encouragement of guilty pleas within the requirement for such need laid down by *Jackson*.[93]

Furthermore, our *non vult* statute serves vital policy interests that are unattainable in other ways.[94] The available alernatives to our statutory sentencing scheme for murder, namely, abolishing all *non vult* pleas and jury waivers, in murder cases, providing mandatory life imprisonment for all first degree murderers regardless of how their guilt was determined, or eliminating the mandatory life imprisonment feature of N.J.S.A. 2A:113-4 and allowing complete sentencing discretion in all murder cases, are neither reasonable nor very attractive. The first is clearly unacceptable in light of this Court's rejection of a similar suggestion in *Jackson*.[95] The second seems

[92] *Id.* at 751-52.

[93] *State* v. *Corbitt*, *supra*, 74 N. J. at 396, 378 A.2d at 244.

[94] The theory employed in *Jackson* requires that the exercise of constitutional rights cannot be penalized unless there are no less burdensome means to secure a more important policy goal. This Court noted, *obiter*, that the policy of allowing a jury to impose the death sentence could be achieved by alternative methods that would not chill the assertion of those rights, such as by allowing a jury to determine the sentence regardless of the method of determining guilt. Hence, the exclusive power of the jury to impose the death penalty could not be upheld as incidental to a valid legislative objective, for the Kidnapping Act "needlessly" penalized defendants who stood on their right to plead not guilty before a jury.

[95] 390 U.S. at 584.

unduly harsh. The third alternative would seriously undermine, if not nullify, the legislative determination that life imprisonment is the appropriate penalty in first degree murder cases. As such, the suggested alternative scheme would be destructive of paramount governmental goals that favor the life imprisonment mandate, namely, deterrence of and just retribution for the most serious and heinous offense recognized by our Legislature. Thus, if proper deference is given to legislative authority, any encouragement to plead *non vult* inherent in our murder statutes' penalty differential cannot be deemed "unnecessary" or "needless" for the Legislature has the broadest discretion possible in enacting penal statutes and in specifying punishment for crime.[96]

Moreover, the practical effect of both the second and third alternatives may be a substantial reduction in the incidence of use of the guilty plea since a defendant would have much to gain and nothing to lose by contesting rather than admitting his guilt. Concomitant with a reduction of guilty pleas is the erosion of many of the policy considerations previously discussed, upon which the plea is based. Since either the second or third alternative would interefere with concededly legitimate state interests, the arguable burden imposed by New Jersey's statutory sentencing scheme for murder on the right to trial by jury is no less necessary than the burdens tolerated in

[96] It may be that if imposition of a fixed term upon conviction by a jury of first degree murder is barred because of the possibility of a lesser term upon a plea of *non vult*, our Legislature, desirous of satisfying the policy considerations underlying the life imprisonment penalty, may conceivably abolish the *non vult* plea to murder altogether and mandate such punishment in all first degree murder cases. It would thus be paradoxical that appellant's challenge to the present statutory sentencing scheme for murder may result in the establishment of one with harsher consequences.

Brady v. *United States, supra, McGautha* v. *California, supra* and *Chaffin* v. *Stynchcombe, supra.*

In sum, we submit that the value of the state interests involved herein clearly outweighs any arguable inhibiting effect of our statutory sentencing scheme for murder upon constitutional rights. In striking this balance, we observe that the degree of inducement, if any, under New Jersey's murder statute is far less severe than that of the Federal Kidnapping Act at issue in *Jackson.* A defendant who proceeds to trial in New Jersey on a murder charge no longer faces a "grisly" choice. His knowledge that those who plead *non vult* face the same possibility of a life term certainly diminishes any alleged agony inherent in his choosing a trial over a plea. Finally, his knowledge that others who plead may receive a sentence less than life imprisonment is no different from the situation confronting all defendants who proceed to trial, aware of the fact that others have obtained bargains to plead guilty in exchange for dismissal of other pending charges or for some other benefit. In short, there are no excessive or unnecessary conditions encompassed in the present New Jersey murder statutes such as to render them unconstitutional. Where the burden of choice is as speculative as this one is, incursions upon valid state interests are not justified.

POINT II

The sentencing scheme of N.J.S.A. 2A:113-3 and N.J.S.A. 2A:113-4 does not constitute a violation of a defendant's right to equal protection.

Defendant has argued that the sentencing scheme of the New Jersey murder statutes violates the Equal Protection Clause of the Fourteenth Amendment. He has

pointed to the fact that those who have pleaded *non vult* to murder may be sentenced to a terms of years, while others who have been convicted of first degree murder following a trial are necessarily sentenced to life imprisonment.[97] The import of the argument is that the State may not impose, without compelling justification, "different punishments for the same" crime where the differing penalties are based entirely on whether the accused has chosen to stand trial.

We contend that the theory advanced is specious and cannot withstand close examination. The question presented is one of due process rather than equal protection since the issue cannot be rationally dealt with in terms of "classifications." The right to a jury trial is not discriminatory. It is available to every defendant. Those who avail themselves of the right to a jury trial are equally subject to a mandatory life imprisonment term upon conviction for first degree murder. So too, those who pled *non vult* to murder are similarly exposed to the maximum punishment although a lesser sentence is possible. To the extent that the penal consequences for all defendants depend upon a combination of variables peculiar to each individual case, it cannot be said that our Legislature has established "invidious classifications" for the purpose of exacting a price upon that category of offenders who exercise a constitutional right.

Other considerations support our position. First, our statutes do not provide disparate punishments "for the same offense." A short form indictment is sufficient to encompass both first and second degree murder.[98] Hence,

[97] N.J.S.A. 2A:113-3, 4.

[98] *State* v. *Zelichowski*, 52 N. J. 377, 382, 245 A.2d 351, 354 (1968).

a defendant is not permitted to plead *non vult* to any particular degree of murder.[99] In the words of the statute, the plea is to be directed "to the indictment" which charges murder generally. In contrast, the mandatory term of life imprisonment is applicable only following a jury finding of first degree murder. It is apparent, therefore, that those who plead *non vult* to "murder" and those who are found guilty of first degree murder are not similarly situated. The sentencing scheme merely reflects this basic reality. Second, an equal protection argument is predicated upon the erroneous assumption that all similar conduct constitutes the "same offense." Although we will shortly set forth our argument in some detail, it is enough to observe here that criminal statutes often overlap in prohibiting the same conduct and a prosecutor's decision to proceed under one or another has never been thought to offend the concept of equal protection. The same principles are applicable with respect to our murder statutes. Although the offense of "murder" and "murder in the first degree" may be said to "overlap," equal protection is not offended as long as the court does not act arbitrarily in exercising its discretionary power to accept or reject a plea of *non vult*.

Even assuming that our murder statutes provide disparate punishments "for the same offense," it is the position of the State of New Jersey that it would be grossly unfair if all had to be sentenced without regard to their acknowledgment of guilt. While it is true that the law may not add a penalty by virtue of a defendant's election to contest the State's charges,[100] it is not irrational to take

[99] *State* v. *Sullivan*, 43 N. J. 209, 245-46, 203 A.2d 177, 197 (1964), *cert. den.* 382 U.S. 990 (1966).

[100] *Scott* v. *United States*, 419 F.2d 264 (D.C. Cir. 1969); *Thomas* v. *United States*, 368 F.2d 941 (5 Cir. 1966).

into account defendant's prospect for redemption reflected by his attitude toward the truth.[101] As the New Jersey Supreme Court aptly observed in *State* v. *Poteet, supra,* "[t]he aims of punishment are several, but the hope is constant that . . . mild or severe, [it] will shape the offender."[102] Assaying the prospects for rehabilitation, the court must look at the man as well as the offense," and it is here that a defendant's candid acknowledgment of guilt should be given some consideration.[103] Although it would be conceptually wrong to enlarge the crime for which a defendant is being punished because he chose to stand trial, it is equally clear that a legislative judgment based upon the premise that a frank confession indicates some promise of rehabilitation is neither unsound nor unjust. In any event the State of New Jersey has exhaustively set forth its argument with regard to this question in Point I. Suffice it to say, we do not perceive it to be a violation of equal protection to accord a benefit to those who have acknowledged their guilt by pleading *non vult.*

A. There is no cognizable class against which equal protection is being denied

The guarantee of equal protection requires that a legislative classification bear a rational relationship to a legitimate governmental goal.[104] When a legislature cre-

[101] *State* v. *Poteet,* 61 N. J. 493, 496, 295 A.2d 857, 859 (1972).

[102] *Id.* at 496, 295 A.2d at 859.

[103] *Id.*

[104] See Tussman and Ten Broek, "The Equal Protection of the Laws," 37 *Calif. L. Rev.* 341, 348 (1949); Note, "Development in the Law: Equal Protection," 82 *Harv. L. Rev.* 1065, 1077-81 (1969).

ates a classification, those similarly situated must be treated alike.[105] It is manifest that the threshold question in resolving any alleged equal protection violation is whether the challenged legislation or state practice creates any classification whatsoever. The point is best illustrated by Justice Harlan's dissenting opinion in *Griffin* v. *Illinois.*[106] There, it will be recalled, the majority held the Illinois practice which required an appellant to absorb the costs of providing a transcript on appeal constituted a violation of equal protection because it unreasonably discriminated on the basis of wealth. Justice Harlan dissented, contending that the basis for the majority holding was not equal protection but rather due process.[107] He explained that when the State imposes legal disabilities upon a named class the equal protection guarantee is called into question.[108] Merely posing a choice or condition to receipt of a State-proffered benefit, on the other hand, involves no classification.[109] Accordingly, such a system is properly analyzed by employing the "fundamental fairness" standard of the due process clause.[110]

In the instant case, the initial inquiry is whether the Legislature has in fact made any classification which ar-

[105] *Id.* at 344-46.

[106] 351 U.S. 12 (1956).

[107] *Id.* at 36.

[108] *Id.* at 35-36.

[109] *Id.*

[110] *Id.* at 36.

bitrarily treats those similarly situated. Otherwise stated, the question presented is whether the New Jersey Legislature has singled out a particular group of individuals and arbitrarily imposed upon that class a legal disability that it does not impose upon all others in a like position. So posited, the State of New Jersey submits that the only class created by the Legislature is the unitary category of indicted murderers. Our statutes offer a series of effectively identical choices to all members of this class. Specifically, all defendants have the opportunity to plead *non vult*. Acceptance of the plea, of course, is in the discretion of the court. Of significance, however, is that all defendants possess an equal opportunity to request the court's indulgence. Thus, the system does not designate two separate classes to which it imposes distinct legal disabilities. Rather, our system merely provides several courses of action to all defendants charged with murder. As such, it differs fundamentally from state laws, held to be violative of equal protection, which divide individuals into two classes on the basis of durational residency (old and new residents) and discriminate against the latter to the extent of totally denying them the opportunity to vote,[111] to receive welfare assistance, [112] or to receive medical care.[113] Thus it is evident that this case does not implicate values underlying the equal protection clause. Rather the question presented is one of due process. Specifically, the issue is whether the election compelled by our statutory scheme is fundamentally unfair. The

[111] *Dunn* v. *Blumstein,* 405 U.S. 330 (1972).

[112] *Shapiro* v. *Thompson,* 394 U.S. 618 (1969).

[113] *Memorial Hospital* v. *Maricopa County,* 415 U.S. 250 (1974).

fairness of the choice, phrased in terms of whether it is constitutionally onerous, has been amply demonstrated.[114]

As previously noted, New Jersey's statutory scheme for murder furnishes an equal choice for all defendants. Any arguable classification inherent in our system results from the defendant's voluntary selection of the statutory option. Even assuming a classification, however, the question becomes whether the State has invidiously discriminated against a particular category of individuals. In determining this issue, it is essential to ascertain what class of defendants are being compared with what other class of defendants, for what purpose and at what point in time.

In this regard, the argument that the defendant who receives a mandatory life imprisonment term after trial and conviction has been discriminated against because he receives a heavier sentence, possibly, than his counterpart who pleads *non vult* errs on two counts. First, the comparison is made at the wrong time—after trial, when the uncertainty of litigation has passed, rather than before trial. Second, the comparison is made between the wrong categories of defendants—the class of defendants convicted after trial versus the class of defendants who plead *non vult* rather than the class of defendants who exercise their right to trial versus the class of defendants who do not.[115] Since the alleged danger in our legislative option is that defendants deciding on a plea will be deterred from exercising their right to a trial, the relevant vantage point is thus before trial, and the relevant comparison is between the expectations of those who insist upon a

[114] See Point I, *supra.*

[115] *Cf. Scott* v. *United States,* 419 F.2d 264, 277 (D.C. Cir. 1969).

trial and those who decide to eliminate the risk of trial by pleading *non vult*.[116] A comparison of those expectations proves illuminating. A defendant indicted for murder who stands trial may be acquitted and hence receive no sentence or may be convicted of a lesser offense and receive a sentence shorter than life imprisonment. One who pleads *non vult* to murder, on the other hand, has no right to demand acceptance of his plea. In any event, acceptance of the plea confers no right to any particular sentence short of life imprisonment. Since the result in either case depends upon a combination of variables peculiar to each situation, it cannot be said that New Jersey has invidiously classified those who stand trial by imposing a mandatory penalty upon conviction any more than that the State has invidiously classified those who plead *non vult* by denying the members of that group the opportunity to be acquitted.[117]

This Court in *North Carolina* v. *Pearce, supra,* rejected a similar equal protection challenge to North Carolina's scheme allowing imposition of a more severe sentence upon reconviction of a defendant who has had his original conviction set aside at his own behest. Noting that a man who is retried after his first conviction has been set aside may be acquitted, or if convicted, may receive a shorter sentence, the same sentence or a longer sentence than the one originally imposed,[118] the Court stated that "[t]o fit the problem of this case into an equal protection framework is a task too Procrustean to be rationally accomplished."[119]

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[116] *Id.* at 276-77.

[117] *Cf. North Carolina* v. *Pearce,* 395 U.S. 711 (1969).

[118] 395 U.S. at 722.

[119] *Id.* at 723.

Accordingly, we submit that appellant's contention regarding the alleged denial of the equal protection guarantee is without merit.

B. Assuming a cognizable class, there is no disparity of punishment for the same offense

A *non vult* plea to murder in New Jersey does not involve the same crime as a conviction for first degree murder, although in some circumstances both may encompass similar conduct. First degree murder is a crime in which conduct of a specific nature and quality is proscribed. The sentence for such conduct is life imprisonment. A *non vult* plea is not comparable to a conviction of a specific degree of murder.[120] Rather, it is a plea to the indictment encompassing conduct which may constitute both degrees of murder, and manslaughter as well.[121] The plea must be accepted without specification of the degree of guilt.[122] Accordingly, the sentence for the plea spans the broad range of conduct encompassed by the indictment. It is apparent that a plea of *non vult* is for an offense different from first degree murder because it includes a far broader range of criminal conduct.

It was upon this basis that a similar claim was rejected by the New Jersey Supreme Court in *State* v. *Sullivan, supra.* There, the defendant had been convicted of first degree murder. On appeal, he contended that our mur-

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[120] *State* v. *Sullivan,* 43 N. J. 209, 245-46, 203 A.2d 177, 197 (1964), *cert. den.* 382 U.S. 990 (1966); *State* v. *Williams,* 39 N. J. 471, 479, 189 A.2d 193, 197 (1963), *cert. den.* 374 U.S. 855 (1963).

[121] *State* v. *Sullivan, supra,* 43 N. J. at 246, 203 A.2d at 197.

[122] *Id.*

der statutes exacted a penalty with regard to those who elected to contest their guilt. It was argued that disparate penalties were imposed depending upon the accused's election to plead *non vult* or contest the State's charges. Defendant claimed that such an election deprived those charged with murder "of due process and equal protection of the law."[123] The court was unpersuaded.

> Not only is there no right to demand acceptance of a plea of *non vult,* but acceptance thereof by the court confers no right to any particular sentence short of life imprisonment. As N.J.S.A. 2A:113-3 prescribes, the term may be for life or for any period up to the 30-year maximum for second degree murder. One reason for the broad expanse of sentencing power is the nature of the indictment. As we have said, it specifies no degree of murder, and will support a conviction of first or second degree murder or manslaughter. (We note in passing it has been suggested persuasively that there is nothing in our rules or statutes which prohibits a specific indictment for second degree murder in a proper case.) Under our cases the plea must be to the indictment. It should not be to a specific degree of murder. Nor does the statute, as in earlier days, contemplate a hearing to determine the degree of guilt or the nature of the sentence to be imposed. *State* v. *Williams,* 39 N.J. 471, 479 (1963). Sentence is passed by the court within the broad limits authorized after consideration of the nature of the offense and a comprehensive probation report. R.R. 3:7-10(b). (*Id.* at 246-47, 203 A.2d at 197).

[123] *Id.* at 245, 203 A.2d at 197.

Appellant contends that since an accused who theoretically commits the same crime as one convicted of first degree murder may plead *non vult,* our statutes impose different punishments for the same offense. This argument is based on the faulty assumption that all similar conduct constitutes the same crime. It is evident, however, that an accused's conduct may violate two overlapping statutes. Where there is such an overlap, the prosecuting authority has discretion to proceed under either statute.[124] So long as the prosecutor does not act arbitrarily and does not discriminate against a class of defendants, it has been held that equal protection is not denied.[125] In short, the mere existence of overlapping statutes is not a deprivation of equal protection.

Just as two or more statutes may cover the same conduct so that different penalties may be imposed for the identical offense, the New Jersey murder statutes may be said to "overlap." The major difference is that under our murder laws, the discretion to administer the statutes does not reside solely in the prosecutor. Instead, the accused may tender a plea of *non vult,* but the court must decide whether to accept it. If a conviction for first degree murder best serves the legislative purpose, the plea must be rejected or a comparable sentence be imposed.[126]

[124] *United States* v. *Berrigan,* 482 F.2d 171 (3 Cir. 1973); *Newman* v. *United States,* 127 U.S. App. D.C. 263, 382 F.2d 479, 480 (1967).

[125] *United States* v. *Rugiero,* 472 F.2d 599, 606 (2 Cir. 1973), *cert. den.* 412 U.S. 939 (1973); *United States* v. *Eisenman,* 396 F.2d 565, 568 (2 Cir. 1968); *United States* v. *Andrews,* 370 F.Supp. 365, 370 (D. Conn. 1974).

[126] *State* v. *Sullivan,* 43 N. J. 209, 203 A.2d 177 (1964), *cert. den.* 382 U.S. 990 (1966); *State* v. *Forcella,* 52 N. J. 263, 245 A.2d 181 (1968), *cert. den. sub nom. New Jersey* v. *Presha,* 408 U.S. 942 (1972).

To further clarify the point, the situation can be viewed in a slightly different fashion. In many instances in which an individual commits a criminal act, his conduct may constitute both a greater and lesser offense. For example, activity which constitutes atrocious assault and battery in New Jersey is also proscribed by our disorderly persons statute.[127] Activity which constitutes robbery also falls within our larceny statute.[128] The prosecutor has discretion to choose the charge. Furthermore, he can charge the greater offense and then later downgrade it in exchange for a plea of guilty. The individual who is tried and convicted of the greater offense is not denied equal protection because another who may have engaged in similar conduct is either charged or convicted of the lesser crime.

Analogously, one who is convicted of first degree murder cannot complain that he was denied equal protection because another was permitted to plead *non vult*. Viewed within this context, it is apparent that equal protection is denied only if the various relevant statutes are applied in an arbitrary or discriminatory fashion. If no particular class is singled out for harsher treatment, the equal protection clause is not violated.

C. The penalty provisions of N.J.S.A. 2A:113-3 and N.J.S.A. 2A:113-4 bear a rational relationship to a legitimate, indeed compelling, state objective

Any analysis of the manner in which statutes are applied must be considered in light of the proposition that

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[127] Compare N.J.S.A. 2A:90-1 with N.J.S.A. 2A:170-26.

[128] Compare N.J.S.A. 2A:141-1 with N.J.S.A. 2A:119-1.

"Legislatures are presumed to have acted constitutionally . . . and their statutory classifications will be set aside only if no grounds can be conceived to justify them."[129] As long as some reasonable basis exists for the recognition of separate classes and disparate treatment, and the legislation has a rational relation to the object sought to be achieved, there is no constitutional infirmity.[130] The function of the judiciary in reviewing a statute "is to determine whether it is possible to say that the legislative decision is without rational basis."[131]

It is the position of the State of New Jersey that the rational relationship test for determining equal protection should be utilized in analyzing the sentencing provision of the murder statutes.[132]. In the area of classification of criminal offenders for purposes of punishment, legislatures are allowed considerable leeway and may provide for differences of treatment so long as there is some rational nexus between the classification and a valid legislative purpose.[133]

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[129] *McDonald* v. *Board of Election Commissioners,* 394 U.S. 802, 809 (1969).

[130] *See Eisenstadt* v. *Baird,* 405 U.S. 438, 446-447 (1972); *United States* v. *Maryland Savings-Share Ins. Corp.,* 400 U.S. 4 (1970).

[131] *Clark* v. *Paul Gray,* 306 U.S. 583, 585 (1939).

[132] This is most consistent with Mr. Justice Stewart's majority opinion in *United States* v. *Jackson, supra,* 390 U.S. 570. He recognized there that the Federal Kidnapping Act's penalty clause was rationally related to the legitimate policy of mitigating the death penalty, but demanded a showing of a necessary relationship between the policy and the waiver procedure. 390 U.S. at 581-83. There is not a single sentence in the opinion which suggests that the procedure must be necessarily related to a compelling state interest.

[133] *Kahn* v. *Shevin,* 416 U.S. 351 (1974); *Rinaldi* v. *Yeager,* 384 U.S. 305 (1966); *State* v. *Corbitt,* 74 N. J. 379, 401, 378 A.2d 235, 247 (1977); *State* v. *Fearick,* 69 N. J. 32, 350 A.2d 227, 230 (1975); *State* v. *Smith,* 58 N. J. 202, 206-207, 276 A.2d 369, 371 (1971).

To be sure, this Court, recognizing this traditional test, has in recent years recognized that there are some situation where it is inappropriate to apply the "rational relationship" test. Certain statutory classifications are so inherently suspect as to compel greater judiciary scrutiny (*i.e.*, those based on race, nationality, alienage, political affiliation and sex). So too, statutory schemes which affect fundamental rights (*i.e.*, voting, travel, rights with respect to criminal procedure) are to be carefully reviewed.[134] In these cases, a stricter equal protection standard has been fashioned by this Court requiring a showing that the statutory scheme challenged is based upon a "compelling governmental interest." Phrased somewhat differently, if a statutory classification is based upon an inherently suspect criterion, or if it affects fundamental rights, then it must be demonstrated that the legislation is necessary to promote a compelling governmental interest.[135] A heavy burden of justification is imposed upon the State and such statutes are closely scrutinized in light of their essential purposes.[136]

It is submitted that the New Jersey statutory scheme for murder does not create a classification which is "inherently suspect." Neither does it affect fundamental rights. Contrary to appellant's assertion, the right to a jury trial is not implicated herein. The imposition of a life sentence is not made to depend upon the exercise of

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[134] See "Developments in the Law—Equal Protection," 82 *Harv. L.Rev.* 1064, 1124-1128 (1969).

[135] See *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) (Harlan, J. dissenting).

[136] *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *State* v. *Chambers*, 63 N. J. 287, 307 A.2d 78 (1973).

the jury trial guarantee but rather upon conviction of first degree murder. Stated somewhat differently, our statutory scheme for murder does not penalize a defendant for standing trial but in reality penalizes him for commission of the offense of first degree murder. Given the legislative determination that life imprisonment is the appropriate punishment in such cases, the fact that the possibility of lesser penalties are provided for statutorily does not place an unconstitutional burden on the defendant's rights to plead not guilty and to demand a jury trial. Accordingly, the proper test to be employed here is the "rational relationship" formula.

Whatever burden of justification the classification created must meet, the State submits that New Jersey's statutory sentencing scheme for murder is constitutional. Our murder statutes have a legitimate purpose and serve a compelling state interest. The State's interest is not in dealing more harshly with the defendant convicted by a jury of first degree murder but rather in ameliorating the rigor of life imprisonment for those offenders who are willing to acknowledge their crime and assume responsibility for their conduct.[137] Responding favorably to an individual's sincere expression of remorse is reasonably and necessarily related to the governmental goal of promoting rehabilitation. Other such purposes, previously discussed, include the facilitation of plea negotiations in homicide cases, necessary to achieve flexibility and efficiency as well as justice in criminal justice administration; the conservation of scarce judicial and prosecutorial resources for those cases which properly require trial; and the prompter imposition of punishment on acknowledged offenders.[138]

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[137] *State* v. *Poteet*, 61 N. J. 493, 496, 295 A.2d 857, 859 (1972); *State* v. *Forcella*, *supra*, 52 N. J. at 275, 299-300, 245 A.2d at 189.

[138] See *Brady* v. *United States*, *supra*, 397 U.S. at 752.

By the same token, it is apparent that a mandatory life term for first degree murder is reasonably related to the goal of deterence. Mandatory penalties are within the power of the legislature to prescribe and the judiciary seldom acts to challenge their validity.[139] In this context, the statutory penalty challenged here serves as a warning to those who might be predisposed to commit the criminal offense that they will be harshly dealt with upon conviction. The penalty is applicable to a class of offenders whose disregard for life justifies severe punishment.

In any event, it is clear that the penalty is supported by a compelling governmental interest. It is incumbent upon the State to protect its citizens against premeditated and deliberate attacks. In sum, the statutory penalty serves a compelling governmental interest in deterring criminal conduct. The judiciary cannot and should not substitute its judgment for that of the Legislature.

Since the penalty provisions of N.J.S.A. 2A:113-3 and N.J.S.A. 2A:113-4 are reasonably and necessarily related to proper governmental objectives and serve compelling state interests, we respectfully submit that the guarantee of equal protection is not denied by the sentencing scheme of the statutes.

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[139] See *State* v. *Howland*, 103 Ariz. 250, 439 P.2d 821 (1968); *McDonald* v. *State*, 501 F.2d 385 (9 Cir. 1974), *cert. den.* 419 U.S. 1004 (1974); *State* v. *Colcord*, 170 Minn. 502, 212 N.W. 894 (1927).

CONCLUSION

Wherefore, the Appellee respectfully submits that the decision of the Supreme Court of New Jersey be affirmed.

Respectfully submitted,

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